No. 87-1318

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1987

VOLT INFORMATION SCIENCES, INC.,
Appellant,

vs.

BOARD OF TRUSTEES OF LELAND STANFORD
JUNIOR UNIVERSITY, Appellee.

ON APPEAL FROM THE
COURT OF APPEAL OF CALIFORNIA
SIXTH APPELLATE DISTRICT

APPELLANT'S OPENING BRIEF

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QUESTIONS PRESENTED

1. Whether a California statute limiting the enforceability of arbitration agreements, which directly conflicts with the Federal Arbitration Act and would therefore ordinarily be preempted in any case involving a transaction covered by the Act, may nevertheless be applied in such a case to deny enforcement of an arbitration agreement, where the agreement appears in a construction contract that is to be performed in California and the contract contains a choice-of-law clause specifying that it "shall be governed by the law of the place where the project is located."

2. Whether a judgment of a state court denying enforcement of an arbitration agreement on the basis of an affirmative answer to the preceding question rests upon an "adequate and independent state ground" that precludes review of the judgment by this Court.

LIST OF AFFILIATED COMPANIES
(Rule 28.1)

Appellant Volt Information Sciences, Inc., is a publicly owned corporation, incorporated in the State of New York. Its subsidiaries (other than wholly owned subsidiaries and wholly owned subsidiaries of wholly owned subsidiaries) are the following: Autologic, Inc., a California corporation; Long Beach Blueprint Company, a California corporation; DataNational Corporation, a Pensylvania corporation; and Courtnay's Pty., Ltd., an Australian corporation. Appellant is also a 50 per cent participant in the following joint ventures: UV Associates, a Missouri joint venture; Australian Directory Services, an Australian joint venture; VNM Directory Support Services, a Nevada joint venture; Pacific Volt Information Systems, a California joint venture; and UVA Company, a Georgia joint venture.

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OPINIONS BELOW

The opinion of the California Court of Appeal is reprinted at pages 62-85 of the Joint Appendix, and is reported in the advance-sheet edition of the California Appellate Reports at 195 Cal.App.3d 349, and in the West's California Reporter at 240 Cal.Rptr. 558. The order of the California Supreme Court denying appellant's petition for review of the court of appeal's decision is unreported and is reprinted at page 87 of the Joint Appendix. The order of the state trial court denying appellant's petition to compel arbitration, also unreported, is reprinted at pages 59-60 of the Joint Appendix.

JURISDICTION

The statutory basis of the Court's jurisdiction in this case is 28 U.S.C. §1257(2), which confers jurisdiction of appeals from judgments of state courts "where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its

validity." 28 U.S.C. §1257(2). The principal claim asserted by appellant at all levels of the proceedings below has been that section 1281.2(c) of the California Code of Civil Procedure is preempted and hence rendered invalid, as applied to this case, by provisions of the Federal Arbitration Act with which this state statute is in direct conflict (JA 67-73; J.S. Apps. E, pp. 2-8; F, pp. 3-5, 12-20; G, pp. 5-7, 23-25). The state trial court and court of appeal have rejected appellant's contention that section 1281.2(c) is preempted by the federal Act, and have accordingly sustained its application to this case as a basis for denying appellant's petition to compel arbitration (JA 59-60, 67-73). Under the decisions of this Court, such a ruling of a state court, rejecting a claim that the application of a state statute in a particular case is preempted by federal law, constitutes a "decision in favor of [the] validity" of the statute as against a contention that it is "repugnant to the Constitution, laws or treaties of the United States" within the

meaning of the governing statute. International Longshoremen's Assn. v. Davis, 476 U.S. 380, 387n.8 (1986); McCarty v. McCarty, 453 U.S. 210, 219-20n.12 (1981). See Perry v. Thomas, ___ U.S. ___, 107 S.Ct. 2520 (1987) (appeal accepted without discussion); Southland Corp. v. Keating, 465 U.S. 1 (1984) (semble); Fidelity Federal S. & L. Assn. v. de la Cuesta, 458 U.S. 141 (1982) (semble); 16 Wright et al., Federal Practice & Procedure §4012 at p. 603 (1977) (Court's appeal jurisdiction under 28 U.S.C. §1257(2) is "regularly exercised in cases involving conflict with federal statutes"). This statutory prerequisite to the assertion of this Court's appellate jurisdiction is therefore clearly satisfied in this case.

This case also fulfills the other condition prescribed by the governing statute for the Court's acceptance of jurisdiction over this appeal - namely, that the appeal be taken from a "[f]inal judgment or decree of the highest court of a State in which a decision could be had." 28 U.S.C. §1257(2). Appellant's claim

of preemption has been rejected on the merits by a final judgment of an intermediate appellate court of California, and the California Supreme Court has exercised its discretion to decline to review the case (JA 67-73, 87). In these circumstances, the intermediate appellate court is effectively constituted "the highest court of [the] State in which a decision could be had," and its judgment accordingly becomes reviewable by appeal to this court. Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 678n.1 (1968); Michigan-Wisconsin Pipeline Co. v. Calvert, 347 U.S. 157, 160 (1954); American Ry. Exp. Co. v. Levee, 263 U.S. 19, 20 (1923). See Perry v. Thomas, supra (appeal accepted without discussion of this point); Fidelity Fed. S. & L. Assn. v. de la Cuesta, supra (semble); McCarty v. McCarty, supra (semble).

Finally, there is no question that this Court's jurisdiction has been timely and properly invoked by appellant. The judgment of the court of appeal was rendered on October 5, 1987, and appellant timely sought review of the

judgment by filing a petition for review in the state supreme court on November 12, 1987 (JA 62; J.S. App. G). See Calif. Rules of Court, Rules 24(a); 28(b). The order of the state supreme court denying appellant's petition for review was entered on December 17, 1987 (JA 87), and the notice of appeal was filed in the intermediate appellate court on January 14, 1988 (J.S. App. D), which is well within the time permitted by the governing statute for the taking of an appeal to this Court. 28 U.S.C. §2101(c) (90 days); American Ry. Exp. Co. v. Levee, supra at 20 (time runs from denial of discretionary review by state supreme court).

In its order granting review in this case, the Court postponed further consideration of the question of jurisdiction to the hearing on the merits, thus informing the parties that the Court is sufficiently concerned about some aspect of its jurisdiction over this appeal to warrant full briefing and argument on this subject. Appellant believes that the object of the Court's concern is not the question of appellant's compliance with the sort of

statutory prerequisites and time requirements that have been discussed above, but instead relates to the additional question, initially raised by appellee in its Motion to Dismiss or Affirm, whether the judgment of the court below may rest upon an "adequate and independent state ground" that would preclude review of the judgment by this Court. A full discussion of this issue would necessarily exceed the scope of the "[c]oncise statement of the grounds on which the jurisdiction of this Court is invoked" that is required to be set forth in this preliminary section of the brief under Rule 34.1(e) of the Rules of this Court. Appellant will therefore withhold treatment of this issue until the "Argument" section of the brief, wherein the issue will be discussed "at the outset" of appellant's argument in the manner required by the terms of Rule 16.8.

STATUTES INVOLVED

The constitutional and statutory provisions involved in this case are the Supremacy Clause of the United States Constitution (U.S. Const., art. VI, cl. 2), sections 1-4 of the Federal

Arbitration Act (9 U.S.C. §§1-4), and section 1281.2(c) of the California Code of Civil Procedure. These provisions have been reproduced in Appendix H to appellant's Jurisdictional Statement.

STATEMENT OF THE CASE

Appellant Volt Information Sciences, Inc. ("Volt"), and appellee Leland Stanford Junior University ("Stanford") are parties to a construction contract pursuant to which Volt has constructed a system of electrical conduits connecting various computer facilities on the Stanford campus (JA 29). Only two of the provisions of this voluminous contract are directly relevant to this appeal. The first of these, the choice-of-law clause, appears in a section of the contract entitled "General Conditions," which consists of a standard-form agreement widely used in the construction industry and generally known as "AIA Document A201" (JA 36). This clause provides simply that "[t]he Contract shall be governed by the law of the place where the project is located" (JA 37).

The other pertinent clause of the agreement, the arbitration clause, appears in a separate section of the contract entitled "Supplementary General Conditions," which consists of a series of special provisions prepared by Stanford that modify the standard-form General Conditions in various respects (JA 40). This particular clause provides that the arbitration clause appearing in the standard-form agreement shall be deleted, and that the following provision shall be inserted in its stead (id.):

> "All claims, disputes and other matters in question between the parties to this contract, arising out of or relating to this contract or the breach thereof, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then prevailing unless the parties mutually agreed [sic] otherwise. In any other arbitration, commenced or demanded pursuant to this Contract, then either party hereto, upon the written request of the other party, shall join in such arbitrations and agree to the consolidation of the arbitrations. This agreement to arbitrate and to join and consolidate arbitrations shall be specifically enforceable under the prevailing arbitration law. The award rendered by the arbitrators shall be final, and judgment may be entered upon it in any court having jurisdiction thereof."

The principal difference between this

provision and the arbitration clause in the standard-form agreement which it displaces concerns the conditions under which an arbitration between the parties may be consolidated with another arbitration of a dispute between one of the parties and a third person arising out of the same project. The standard-form clause would have expressly prohibited consolidation of such third-party disputes without the written consent of all concerned parties (JA 37-38). By contrast, the substituted special provision quoted above not only pointedly omits any such prohibition, but additionally includes an express mandate for the consolidation of separate arbitrations that might arise from the parties' transaction (JA 40).

Stanford thus clearly contemplated the possibility of potentially duplicative proceedings resulting from disputes with the various participants in the project, and deliberately chose to deal with this problem, not by inserting a proviso excusing the parties from their duty to arbitrate in that event, but

rather by simply authorizing the consolidation of any separate arbitrations that might result from such disputes. Having chosen this course, however, Stanford then inexplicably neglected to include arbitration clauses in the agreements which it entered into with these other participants (Joint Appendix filed by the parties in the court of appeal, pp. 126, 135, 144). The contracts with the project architect and the construction manager, in particular, omitted any provision for arbitration of disputes arising under those contracts (id.).

During the course of the project, various disagreements arose between Volt and Stanford which the parties were unable to settle by negotiation (see JA 51-52). Accordingly, at the conclusion of the project, Volt submitted to Stanford a demand for arbitration of these disputes pursuant to the arbitration clause of the parties' contract (JA 49). Stanford, however, refused to proceed with the arbitration, and instead filed suit against Volt in the state superior court (JA 6). In its complaint, Stanford asserted several causes of

action against Volt involving all of the same matters that were the subject of Volt's demand for arbitration (JA 12-21). In addition, the complaint stated a single cause of action for declaratory relief against the architect and construction manager, in which Stanford sought a declaration that, in the event it should be held liable to pay any damages to Volt, these firms should be required to indemnify it for any amount thus paid (JA 22-24).

Volt thereupon petitioned the superior court, pursuant to both the Federal Arbitration Act, 9 U.S.C. §§1 et seq., and the California Arbitration Act, Calif.Code Civ.Proc. §§1280 et seq., to compel arbitration and to stay the prosecution of Stanford's claims against it pending the outcome of the arbitration (JA 42). Stanford, in turn, moved to stay the arbitration, contending that arbitration of its dispute with Volt could not be compelled during the pendency of litigation involving additional claims against the architect and construction manager arising out of the same transaction which could not be arbitrated because of the

omission of any arbitration clause from its agreements with those parties (Joint Appendix filed by the parties in the court of appeal, p. 209). In support of its motion, Stanford relied on the provisions of section 1281.2(c) of the California Code of Civil Procedure, which permits a superior court to deny a petition to compel arbitration or to stay a pending arbitration when "[a] party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions, and there is a possibility of conflicting rulings on a common issue of law or fact."

In its opposition to Stanford's motion, Volt contended that section 1281.2(c) was inapplicable in the circumstances presented here, and that in any event, since this project involved interstate commerce, this state statute was effectively preempted by the conflicting requirements of the Federal Arbitration Act, which do not permit avoidance of an arbitration agreement on the grounds

specified by this statute (J.S. App. E). In its response to this latter contention, Stanford did not dispute that the application of federal law would indeed require enforcement of its agreement to arbitrate, but instead contended that the federal Act was rendered inapplicable in this context by the provision of the parties' agreement specifying that its enforcement should be governed by "the law of the place where the project is located" (Joint Appendix filed by the parties in the court of appeal, pp. 225-27).

Apparently in reliance on this choice-of-law clause, the superior court rejected Volt's argument that Code Civ.Proc. §1281.2(c) was preempted by federal law and held that this statute effectively excused Stanford from its obligation to arbitrate (JA 59-60). The court accordingly entered an order denying Volt's petition to compel arbitration and granting Stanford's motion to stay the arbitration until the conclusion of the lawsuit (id.).

Volt filed a timely appeal to the California Court of Appeal for the Sixth Appellate

District, reiterating its contention that Calif.Code Civ.Proc. §1281.2(c) was preempted by the contrary prescriptions of the Federal Arbitration Act (J.S. App. F). On the specific issue of the effect of the choice-of-law clause, Volt argued (1) that the clause did not in fact preclude the application of federal law because the phrase "law of the place where the project is located" necessarily encompassed all of the law - local, state, and federal - that was in fact applicable at the project site; (2) that the same result would follow even if this phrase were construed as an exclusive reference to California law, because the nature of the federal system is such that federal law constitutes an integral part of the law of California, as of every other state; and (3) that in any event, a substantial body of authority had held that any such contractual choice-of-law provision that purported to foreclose the application of the Federal Arbitration Act to a transaction that would otherwise be subject to its terms should simply be invalidated as an illicit attempt to subvert

the objectives of the Act (id., pp. 11-20).

The court of appeal rejected all of these arguments and affirmed the superior court's order in an opinion in which two members of the court joined (JA 62-80). The court held that application of the federal Act was foreclosed by the choice-of-law clause and accordingly rejected Volt's preemption claim and sustained the superior court's reliance on Code Civ.Proc. §1281.2(c) as a proper basis for denying Volt's petition to compel arbitration (id.). The third member of the court dissented from this ruling, stating his view that the choice-of-law clause did not preclude the application of federal law to this case, because, in his words, "even assuming arguendo that it must be interpreted as an agreement to have California law govern, ... where federal law is supreme, California law mandates that federal law controls" (JA 81-85).

Volt filed a timely petition for review in the California Supreme Court, again reiterating all of the arguments it had made in the courts below and, in addition, calling the court's

attention to the several conflicting resolutions of the question presented by this case that had been reached by various appellate courts in California and elsewhere (J.S. App. G). On December 17, 1987, the California Supreme Court issued its order denying Volt's petition for review (JA 87). By the same order, the court directed that the court of appeal's opinion should not be published in the permanent edition of the official California Appellate Reports (id.). Volt filed its notice of appeal to this Court on January 14, 1988, and its Jurisdictional Statement on February 8, 1988 (J.S. App. D). On March 28, 1988, the Court entered its order granting a hearing of the appeal and postponing further consideration of the question of jurisdiction to the hearing on the merits.

SUMMARY OF ARGUMENT

1. Jurisdiction. For several reasons, the decision of the court of appeal cannot be said to rest upon an "adequate and independent state ground." First of all, each of the issues decided by the court is, in the last analysis,

an issue of federal law rather than state law. While it is true that both choice of law and the interpretation of private contracts are ordinarily viewed as exclusive domains of the state courts, the issues presented here do not properly fall within either of these categories in any usual sense. The particular "choice of law" required in this case is a choice between federal and state law rather than between the laws of different states. Lest the application of the Supremacy Clause be entirely delegated to the state courts, this sort of "choice of law" must necessarily be treated as an exclusively federal concern. As for the matter of contract interpretation, the court of appeal's peculiar construction of the choice-of-law clause has transformed that provision into an effective waiver of Volt's federally guaranteed right to compel arbitration of the parties' dispute. It is well settled that the interpretation and application of such an alleged waiver of rights conferred by federal law are likewise exclusive federal prerogatives. Moreover, in any event, the court's

interpretation of the clause is not based on an application of any general rules of state law, but instead relies solely on a narrow "rule" of its own making to the effect that a choice-of-law clause of the kind presented here must be construed to preclude the application of federal law to the parties' contract. Such a narrowly focused "rule," whose only function is to determine the applicability of federal law, should not be regarded as a rule of state law at all, let alone a matter of sufficient of state interest to foreclose review of a state court's decision under the doctrine of "adequate and independent state ground."

Secondly, even if the court of appeal's construction of the choice-of-law clause were to be regarded as based upon principles of state law, it would not be insulated from review under this doctrine in any event, because it does not rest upon any grounds which are either "independent" or "adequate" within the meaning of those terms as they have been defined in the decisions of this Court. The

court's interpretation of the clause is not "independent" of the principles of federal law because (1) it logically depends upon a resolution of the preeminently federal question whether federal law is in fact a part of the "law of the place where the project is located," and (2) its validity must ultimately be assessed under the standards imposed by the settled federal rule that any arbitration agreement subject to the Federal Arbitration Act must be liberally construed to promote the federal policy favoring the arbitration of private disputes. Nor is the court's disposition of this issue "adequate" in the sense of being sufficient to sustain its judgment without the resolution of any additional federal issues, because the ultimate effect of accepting the court's interpretation of the choice-of-law clause would simply be to render that clause invalid as applied to this case on the ground that it violates the federal public policy manifested by the Federal Arbitration Act. Finally, the court's decision is not "adequate" in the additional sense of resting

upon a "fair or substantial basis," because, as will be shown in the argument on the merits, it manifestly contravenes, not only the plain language of the contract, but every relevant legal principle that ought to bear upon the interpretation of this type of provision.

2. Basic Rules Governing Application of the Arbitration Act to This Case. There is no serious controversy that the Federal Arbitration Act would govern this case and would require arbitration of the parties' present dispute if its application to the case were not prevented by the court of appeal's interpretation of the choice-of-law clause. The project at issue here easily satisfies the interstate-commerce requirements of the Act, and the only objection to arbitration raised by Stanford - the pendency of litigation involving related non-arbitrable claims against third parties - would not afford a legitimate defense to enforcement of the arbitration agreement under federal law.

3. Interpretation of the Choice-of-Law Clause. Several compelling considerations

effectively rebut the court of appeal's conclusion that the choice-of-law clause in the parties' contract must be interpreted to exclude the application of federal law to this transaction. Such an interpretation is, first of all, a historical anomaly, inasmuch as choice-of-law principles in general and contractual choice-of-law provisions in particular have traditionally been applied only to resolve conflicts between the laws of coequal sovereigns, and have never been viewed as pertinent to the relationship between state and federal law or as purporting to resolve issues of federal preemption. Second, this interpretation is belied by the clear literal terms of the parties' contract, including both the choice-of-law clause itself, which on its face encompasses all of the several bodies of law that are in fact applicable at "the place where the project is located," and the remaining provisions of the contract, which contain several clear indications that otherwise applicable federal laws were meant to govern the execution of this project. Third,

the notion that the term, "the law of the place where the project is located," does not encompass federal law is additionally at variance with the fundamental principle that federal law is an inherent part of the laws of every state and of every "place" in the federal union. Fourth, although there is no specific evidence of the intent underlying the parties' adoption of the choice-of-law provision, the circumstantial evidence strongly suggests that the disallowance of federal remedies would frustrate the parties' intent to require arbitration of precisely the type of dispute that arose in this case. Fifth, the view that the application of the Federal Arbitration Act might be foreclosed by a contractual choice-of-law provision is contrary to both the overwhelming weight of authority on this precise issue in the lower courts and the only prior decisions of this Court that have any bearing on the issue. Finally, insofar as the lower court's interpretation of the choice-of-law clause has prevented enforcement of the parties' contractual duty to arbitrate their

dispute, this interpretation infringes the established rule that, in construing any contractual provision affecting the arbitrability of a dispute subject to the Federal Arbitration Act, all doubts must be resolved in favor of compelling arbitration.

4. Invalidity of the Choice-of-Law Clause as Interpreted by the Court of Appeal. Even if the court of appeal's interpretation of the choice-of-law clause were to be accepted, reversal of its judgment would still be required because that interpretation would effectively render the clause invalid and unenforceable. The courts of all jurisdictions, including this Court, have consistently held that a contractual choice-of-law provision should be disregarded if the result of its application would contravene a fundamental public policy of the jurisdiction whose law would otherwise apply to the transaction. The courts have also generally declined to accede to such a provision where it would effectively nullify one of the obligations imposed by the parties' contract. Under these settled rules,

the choice-of-law clause in the Volt-Stanford contract would be rendered unenforceable by acceptance of the court of appeal's interpretation of that clause, since that interpretation would both nullify the parties' contractual duty to arbitrate their present dispute and contravene the fundamental federal policy favoring the settlement of such disputes by arbitration. The majority of lower courts have reached precisely this result with respect to any choice-of-law provision purporting to foreclose reliance on the Federal Arbitration Act and thereby to prevent enforcement of an arbitration agreement. In the event this Court should be compelled to address this issue by its acceptance of the court of appeal's interpretation of the choice-of-law clause in this case, it should likewise hold that the clause, as so interpreted, is unenforceable as a violation of federal public policy.

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ARGUMENT

I. The Court of Appeal's Judgment Does Not Rest Upon an "Adequate and Independent State Ground" That Would Preclude Review of the Judgment by This Court.

By its order postponing further consideration of the question of jurisdiction, the Court has indicated that it has some doubt regarding its jurisdiction over this case. The apparent source of this doubt is Stanford's contention, in its Motion to Dismiss or Affirm, that the decision of the court of appeal consisted of nothing more than an adjudication of ordinary issues of choice of law and contractual interpretation that are customarily viewed as exclusive responsibilities of the state courts (Motion to Dismiss or Affirm, pp. 14-15). Stanford's argument to this effect has evidently suggested to the Court the possibility that the judgment below may rest upon an "adequate and independent state ground" that would preclude review of the judgment by this Court. Volt will demonstrate in this section of the brief that the judgment of the court of appeal is not in fact insulated from review by this jurisdictional limitation, because the

grounds on which it rests are not state-law grounds at all, and, in any event, could not be viewed as either "adequate" or "independent" within the settled meaning of those terms.

A. All of The Issues Presented by This Appeal Are Exclusively Issues of Federal Law.

Except in a very superficial sense, this case does not actually involve any issues of state law. While it is true that the general subjects of choice of law and contract interpretation are ordinarily regarded as the exclusive concern of the state courts and legislatures, the specific issues presented in this case exhibit certain special characteristics that clearly remove them from the operation of this general rule and place them squarely within the category of exclusively federal questions that this Court is fully competent to adjudicate.

1. The So-Called "Choice-of-Law" Issue Is Really an Issue of Federal Supremacy.

This point is most easily demonstrated with respect to the so-called "choice-of-law" issue that is presented by this case. Stanford has correctly noted, citing Day & Zimmerman, Inc.

v. Challoner, 423 U.S. 3 (1975), that the federal courts, including this Court, are ordinarily bound by decisions of the state courts on issues of choice of law (Motion to Dismiss or Affirm, p. 14). All of the decisions that have established this rule, however, including Challoner and its better known predecessor Klaxon v. Stentor Mfg. Co., 313 U.S. 487 (1941), have involved what might be called be "horizontal" choices between the laws of two different states. The particular "choice of law" at issue in this case, by contrast, is a "vertical" choice between state and federal law. The rule of the Challoner and Klaxon decisions has never been applied to this type of "choice of law," and indeed no court, with the exceptions of the court of appeal in this case and the courts that rendered the two earlier aberrant decisions relied upon in the court of appeal's opinion, has even purported to treat this type of conflict between state and federal laws as presenting a "choice of law" problem. Quite plainly, the issue posed by such a conflict is not one of "choice of

law" at all, but is instead a straightforward issue of federal supremacy that must be adjudicated according to the familiar principles of federal constitutional law that have been developed by this Court in the course of its application of the Supremacy Clause of the United States Constitution.

Because it has so seldom occurred to any court or litigant to treat this type of federal-state conflict as a "choice of law" problem, no direct citation can be provided for this conclusion. (But cf. the numerous decisions cited in part III.E below holding or assuming that a contractual choice-of-law clause does not displace otherwise applicable federal law). Volt submits, however, that the point is sufficiently obvious to require no citation. Indeed, any other conclusion would effectively subsume all issues of federal supremacy under the heading of "choice of law," and would thus, under the rule of Klaxon and Challoner, consign the entire area of Supremacy Clause adjudication to the courts of the fifty states. This is of course an inadmissible

result. It follows that there is no "choice-of-law" issue presented by this case in any acceptable sense of that term. The issue Stanford has sought to characterize as such is really a prototypical issue of federal supremacy which this Court is perfectly free to decide without deference to any prior ruling on the issue by a state court.

2. The Issue of Contract Interpretation Likewise Presents a Federal Question.

The same conclusion must be drawn with respect to the issue of contract interpretation, albeit for slightly less obvious reasons. Once again, it is true, as Stanford has noted, that the interpretation and application of private contracts are ordinarily viewed as presenting questions of state law. For two very compelling reasons, however, this general principle is inapplicable to the particular contract interpretation at issue in this case. The first of these reasons consists of a specific exception to this rule which this Court has carved out for contractual releases or waivers of rights conferred by federal statutes. The other reason derives from a

unique feature of the particular state-court ruling at issue here which entirely removes that ruling from the scope of the general principle that ordinarily accords primacy to state-court interpretations of private contracts.

a. This Issue Involves a Purported Waiver of Federal Rights That Must Be Adjudi- by Federal Standards.

As construed by the court of appeal, the choice-of-law clause in the Volt-Stanford contract not only effectuates a choice between the laws of different states, but also entirely precludes the application of federal law to this transaction. Under this interpretation, therefore, any rights under federal law which the parties might otherwise have enjoyed by virtue of their participation in the transaction were effectively relinquished by their adoption of this clause. The court of appeal's construction of the clause has thus transformed it into the precise equivalent of an advance waiver or release of all of the rights and benefits conferred on the parties by federal law, including specifically their right to

enforce the arbitration clause in their agreement pursuant to the terms of the Federal Arbitration Act. See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637n.19 (1986).*

This Court has several times held that the interpretation and application of this sort of purported waiver or release of rights conferred by a federal statute must be treated as a question of federal law that should be resolved without reference to state-law rules governing the construction of ordinary contracts. Zenith Radio Corp. v. Hazeltine Research Co., 401 U.S. 321, 343-44 (1971); Aro Mfg. Co. v. Convertible Top Co., 377 U.S. 476, 500-1 (1964); Dice v. Akron, Canton & Youngstown R.R. Co., 342 U.S.

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* In the cited passage of its opinion in the Mitsubishi case, this Court acknowledged the potential equivalence between a choice-of-law clause and a waiver of federal rights by relying on decisions involving the validity of waivers of federal antitrust claims to support its observation that an international choice-of-law clause might be invalidated if were found to preclude enforcement of a claim asserted under American antitrust law. Id.. This and other aspects of the Mitsubishi decision will be discussed more fully in the argument on the merits.

359, 361-62 (1952); Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 704-7, 715 (1944); Garrett v. Moore-McCormack Co., 317 U.S. 239, 243-47 (1942); Sola Elec. Co. v. Jefferson Elec. Co., 317 U.S. 173, 175-76 (1942). See Liner v. Jafco, Inc., 375 U.S. 301, 308-9 (1964). Although each of these decisions involved a particular federal statute, there is no indication in any of the opinions that the rule there enunciated was intended to be anything other than a rule of general application, and indeed the broad language of several of the opinions is clearly suggestive of such a general principle. E.g., Sola Elec. Co. v. Jefferson Elec. Co., supra at 176 ("the prohibition of a federal statute may not be set at naught, or its benefits denied, by state statutes or common law rules").* The lower

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* In recent years, this Court has evidenced a somewhat greater reluctance to enunciate uniform rules of federal law to govern the various incidents of rights conferred by federal statutes, and has instead often chosen to incorporate or "borrow" principles of state law to serve this purpose. E.g., Burks v. Lasker, 441 U.S. 471, 477-78 (1979); United States v. Kimbell Foods, Inc., 440 U.S. 715, 727-29 (1979); Robertson v. Wegmann, (contd.)

courts, at any rate, have generally applied the rule to require resort to federal law in adjudicating the scope and validity of waivers

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(footnote contd.) 436 U.S. 584, 591-92 (1978). See United States v. Little Lake Misere Land Co., 412 U.S. 580, 594-95 (1973). Even if this "borrowing" approach were now to be applied in determining the validity of releases of federal statutory rights, however, this would not affect the particular point being made here. In each of the cases in which this approach has been utilized, the Court has gone out of its way to reaffirm that its decision ultimately turns upon federal law, and that its adoption of a state rule to resolve a particular issue is motivated, not by any compulsion or lack of authority to do otherwise, but rather by a determination that this course seems best suited to the purposes of the federal statutory scheme. E.g., Burks v. Lasker, supra at 476-77; United States v. Kimbell Foods, Inc., supra at 726-27; Robertson v. Wegmann, supra at 588. See United States v. Little Lake Misere Land Co., supra at 592-93; United States v. Standard Oil Co., 332 U.S. 301, 305-7 (1947); D'Oench, Dume & Co. v. FDIC, 315 U.S. 447, 471-72 (1942) (Jackson, J., concurring). In effect, under this approach, the state rule being adopted as the rule of decision simply becomes a rule of federal law. Id.. Thus, while a decision to pursue this "borrowing" approach as to the validity of a release of a federal statutory right might alter the outcome of a particular case on the merits, it would have no effect on the Court's jurisdiction in a case arising from a state court, since the ultimate dependence of the decision on federal law clearly forecloses any argument that the Court's authority to decide the case might be nullified by an "adequate and independent state ground." RFC v. Beaver County, 328 U.S. 204, 206-7, 210 (1946) (implicit holding to this effect).

or releases of virtually every variety of federal statutory claim. E.g., Gamewell Mfg. Co. v. HVAC Supply, Inc., 715 F.2d 112, 113-16 (4th Cir. 1983) (patent laws); Parker v. DeKalb Chrysler-Plymouth, Inc., 673 F.2d 1178, 1180 (11th Cir. 1982) (Truth in Lending); Fulgence v. J. Ray McDermott & Co., 662 F.2d 1207, 1208-9 (5th Cir. 1981) (Title VII); Jones v. Taber, 648 F.2d 1201, 1203 (5th Cir. 1981) (Civil Rights Act); Ott v. Midland-Ross Corp., 523 F.2d 1367, 1368-69 (6th Cir. 1975) (Age Discrimination Act); Three Rivers Motors Co. v. Ford Motor Co., 522 F.2d 885, 888-91 (3d Cir. 1975) (Sherman Act); Redel's, Inc. v. General Elec. Co., 498 F.2d 95, 98-99 and n.2 (5th Cir. 1974) (Sherman Act). See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., supra, 473 U.S. at 637n.19 (citing with approval Redel's, Inc. v. General Elec. Co., supra, and other decisions to the same effect). At this stage, therefore, it is fair to conclude that these decisions have established a general doctrine to the effect that federal rather than state law must provide the ultimate standard for

interpreting or applying any such purported waiver or release of a federal right. While no decision to date has addressed the question in a case involving the Federal Arbitration Act, the general scope of this doctrine would clearly seem to encompass a waiver of any rights conferred by the terms of that Act.*

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* The lower federal and state courts have in fact addressed a closely related question regarding alleged waivers of the right to compel arbitration pursuant to the Act. In numerous decisions, the courts have unanimously held that the question whether a party has waived his right to arbitration under the Act by undue delay in the assertion of that right presents a federal issue that must be resolved in exclusive accordance with federal law. E.g., Price v. Drexel Burnham Lambert, Inc., 791 F.2d 1156, 1158-59 (5th Cir. 1986); Maxum Foundations Inc. v. Salus Corp., 779 F.2d 974, 981-84 (4th Cir. 1986); In re Mercury Constr. Corp., 656 F.2d 933, 938-40 (4th Cir. 1981), affd. sub nom. Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983); E.C. Ernst, Inc. v. Manhattan Constr. Co., 551 F.2d 1026, 1040 (5th Cir. 1977); Hart v. Orion Ins. Co., 453 F.2d 1358, 1360-61 (10th Cir. 1971); Hilti, Inc. v. Oldach, 392 F.2d 368, 370-72 (1st Cir. 1968); ADC Constr. Co. v. McDaniel Grading Co., 338 S.E.2d 733, 737-38 (Ga.App. 1986); Mamlin v. Susan Thomas, Inc., 490 S.W.2d 634, 638 (Tex. Civ.App. 1973). Since this type of waiver is specifically treated in the provisions of the Act itself, however, these decisions probably cannot be regarded as directly applicable to the sort of contractual waiver that is involved in this case. 9 U.S.C. §3 (precludes arbitration where party is "in default in proceeding with such arbitration"). (continued)

As shown above, the court of appeal has enforced precisely such a waiver of Volt's rights under the Federal Arbitration Act by its interpretation of the choice-of-law clause in the parties' contract. It follows, under the rule just described, that the correctness of that interpretation ultimately presents a question of federal law, and therefore, a fortiori, that this Court's consideration of that question cannot be foreclosed on the basis of an alleged "adequate and independent state ground."

b. The Only Principle of Contract Interpretation upon Which This Issue Turns Is a Principle Whose Sole Function Is to Determine the Applicability of Federal Law.

Besides the specific rule governing waivers of federal rights, there is yet another, more fundamental reason why the court of appeal's

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(footnote contd.) The only possible exception to this generalization is the decision of the Fourth Circuit in Maxum Foundations, Inc. v. Salus Corp., supra, where a party was charged with having waived his right to compel arbitration, not only by delay, but also by having entered into a settlement agreement, and where the court apparently relied upon federal law to dispose of both of these issues. Id., 779 F.2d at 981-84.

interpretation of the choice-of-law clause must be viewed as presenting a purely federal issue. The supposed state-law ground that is claimed to foreclose review of the lower court's judgment in this case is of a very different sort from the state-law principles that have been claimed to constitute "adequate and independent state grounds" in all of the prior cases involving this jurisdictional issue that have come before this Court. In those earlier cases, the principle in question was invariably a rule of general application, not only to claims asserted under federal law, but to the entire range of claims and disputes arising under state law as well. E.g., International Longshoremen's Assn. v. Davis, 476 U.S. 380 (1986) (scope of state court's jurisdiction); Ake v. Oklahoma, 470 U.S. 68 (1985) (uniform state procedural rule); South Dakota v. Neville, 459 U.S. 553 (1983) (state constitutional provision); Zacchini v. Scripps-Howard Broadcasting Corp., 433 U.S. 562 (1977) (state law of intellectual property); Demorest v. City Bank Farmers Trust Co., 321 U.S. 37 (1944)

(state rule for allotment of trust income); Fox Film Corp. v. Muller, 296 U.S. 207 (1935) (rule governing severability of invalid contract provisions); Abie State Bank v. Bryan, 282 U.S. 765 (1931) (doctrine of estoppel by acceptance of benefits of contract); Fox River Paper Co. v. Railroad Comm., 274 U.S. 651 (1927) (property rights of riparian owners).

The purported state-law ruling involved here is not at all of this kind. The court of appeal, in its opinion, has invoked no general rule of contract interpretation or choice of law - or indeed any general principle of state law whatever - to justify its construction of the choice-of-law clause (JA 66-67). Rather, the only rationale for that construction offered by the court is its own conclusory pronouncement to the effect that "[w]e have no doubt" that the particular terms of this clause were meant to exclude federal law from any application to this controversy (JA 66).*

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* It is true that the court also cites certain authorities to support its interpretation of the clause. Only two of the cited decisions, however, even address the issue (continued)

If this conclusory determination involves any legal principle at all, it consists of nothing more than a very specialized rule narrowly prescribing that the parties' adoption of a choice-of-law clause selecting the law of a particular place or state shall be deemed to preclude the application of federal statutes to the parties' transaction. It is a rule, in other words, whose sole subject and purpose is a determination of the applicability of federal law in cases involving a certain kind of choice-of-law clause.

Volt submits that this unique variety of state-law rule - that is, a rule whose exclusive concern is the role to be assigned to

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(footnote contd.) presented here, and their resolution of the issue is even more cryptic and conclusory than that of the court of appeal in this case. Garden Grove Comm. Church v. Pittsburgh Des Moines Steel Co., 191 Cal.Rptr. 15, 18 (Cal.App. 1983); Standard Co. of New Orleans v. Elliott Constr. Co., 363 So.2d 671, 677 (La. 1978). These two decisions, together with the numerous contrary decisions on the question, will be discussed below in the argument on the merits, where it will be shown that the court of appeal's ruling in fact has no significant authoritative support, and indeed contravenes the overwhelming weight of authority on this issue, both in other jurisdictions and in California itself.

federal law in the resolution of a particular type of dispute - cannot properly be treated as providing an "adequate and independent state ground" for a state court's decision. Not being a rule of general application, it certainly does not implicate any of the policies underlying the principle that this Court has no authority to adjudicate substantive questions of state law - such as the desirability of uniformity in the application of state-law rules without regard to the forum in which they are applied, and respect for the independent constitutional role of state law as the primary source of most of the substantive legal rules that govern private relations. See Michigan v. Long, 463 U.S. 1032, 1040 (1983); RFC v. Beaver County, supra, 328 U.S. at 210; Murdock v. City of Memphis, 20 Wall. (87 U.S.) 590, 626, 630 (1875); 16 Wright et al., Federal Practice & Procedure, §4021, pp. 679-82 (1977). Cf. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). At the same time, since the only function of this rule is to determine whether federal law applies to a particular trans-

action, the federal interest in the substantive content of the rule would appear to be paramount if not exclusive - indeed, of the same order of magnitude as the federal interest in the resolution of any question of federal supremacy. Cf. United States v. Little Lake Misere Land Co., supra, 412 U.S. at 595-96; Liner v. Jafco, Inc., supra, 375 U.S. at 308-9; Ward v. Love County, 253 U.S. 17, 24 (1920). These considerations would seem to compel the conclusion that this specialized rule of contract interpretation should not even be treated as a legitimate subject of state law at all, let alone a matter of sufficient state concern to foreclose this Court from even undertaking to review a state-court decision applying the rule.

Supportive authority for this conclusion is difficult to find, in part because the conclusion itself is so elementary, and in part because of the unique character of the particular state-law rule at issue here. Perhaps the closest analogue is the decision of this Court in United States v. Little Lake Misere

Land Co., supra, 412 U.S. 580, where the Court laid down a general principle that would deny any effect to a rule of state law that discriminates against federal interests or specifically purports to abrogate rights that have been acquired pursuant to a federal statute. Id., 412 U.S. at 595-97. See also id. at 607-8 (Rehnquist, J., concurring). Since the purported rule of contract interpretation at issue here is precisely and narrowly intended to foreclose the application of federal law, and thus to abrogate federally guaranteed rights, in all of the situations that are covered by the rule, this analogy seems entirely appropriate. The principle enunciated by the Court in Little Lake Misere thus serves to provide further support, if any were needed, for the otherwise self-evidently sound proposition that a purported state-law rule having no purpose or effect other than to foreclose reliance on a federal statute cannot be accorded the status of an "adequate and independent state ground" for a state court's decision refusing to enforce such a statute.

3. This Court Has Previously Assumed, by Accepting Jurisdiction to Decide This Same Issue in the de la Cuesta Case, That the Issue Presented by This Appeal Is a Federal Question Appropriate for Decision by This Court.

Although the Court's request for briefing on the issue of its jurisdiction indicates that it does not consider this question as having been foreclosed by precedent, it nevertheless should be mentioned that the Court has already resolved this jurisdictional issue on at least one occasion, albeit sub silentio, by its assumption of jurisdiction to decide the precise question that is presented on the merits of this appeal. The decision referred to, which will be discussed at greater length in Volt's argument on the merits, is the decision of the Court in Fidelity Federal S. & L. Assn. v. de la Cuesta, 458 U.S. 141 (1982). In that case, one of the alternative grounds that had been relied upon by the state court of appeal in dismissing a preemption challenge to a state rule governing the effect of "due-on-sale" clauses in certain mortgage agreements was a provision in the agreements specifying that they should be "governed by the law of the

jurisdiction in which the property is located." Id., 458 U.S. at 150-51. The state court had interpreted this provision to preclude the application of federal law to the parties' transactions. Id. This Court proceeded to address and reject this interpretation on its merits, holding that "the law of the jurisdiction" should instead be construed to include federal as well as state law. Id., 458 U.S. at 157n.12. Nowhere in the Court's discussion of this issue is there any reference to the possibility that the state court's interpretation of the mortgage agreements might have been insulated from review by the doctrine of "adequate and independent state ground." The implication is clear that the Court regarded this issue as a federal question which it was authorized to decide without deference to the contrary views of the state court.*

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* The fact that the contract at issue in de la Cuesta consisted of a standard-form contract promulgated by a federal agency, incidentally, does not provide an independent explanation for the Court's assumption of jurisdiction which would distinguish that decision from the present case. The regulations of the agency authorized, but did not require, the (contd.)

Admittedly, a holding sub silentio is not the most persuasive form of authority. Nonetheless, when the precedential effect of the de la Cuesta decision is added to the several persuasive considerations that have been adduced in the earlier discussion, the conclusion is compelled that the issue presented by this case must ultimately be treated as a federal question to which the doctrine of "adequate and independent state ground" should have no application whatsoever.

B. In Any Event, Even if the Court of Appeal's Ruling on the Interpretation Issue Could Properly Be Viewed as Resting Upon Principles of State Law, That Ruling Would Not Present an "Adequate and Independent State Ground" for the Court's Judgment.

Even if the Court should decide, despite the contrary conclusion drawn in the preceding

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(footnote contd.) use of the form contract by lending institutions, and the decision whether to use the form was therefore left to the discretion of each institution. Id., 458 U.S. at 146-47, 155. Indeed, one of the mortgages involved in the case did not incorporate certain of the provisions of the standard-form contract. Id. at 148, 151n.8. Notwithstanding their federal source, therefore, the contracts at issue in that case were essentially private contracts no different from the contract between Volt and Stanford in this case.

discussion, that the court of appeal's interpretation of the choice-of-law clause was in fact based on an application of state law, that interpretation would still fall short of providing an "adequate and independent state ground" for the court's judgment, because it fails to satisfy any of the specific conditions that have been imposed by this Court as prerequisites to the invocation of this doctrine to foreclose review of a state court decision. Specifically, as will now be shown, the state court's ruling is neither "independent" of certain intertwined issues of federal law, "broad enough to sustain the judgment" without consideration of additional federal questions, nor supported by any "fair or substantial basis" for the particular interpretation of the choice-of-law clause that was adopted by the court.

1. The Court of Appeal's Decision on This Issue Is Logically Dependent upon and "Interwoven" with the Resolution of at Least Two Issues of Federal Law.

It is well settled that a state court's mere reliance on a rule of state law to justify its decision will not be deemed to provide an

"adequate and independent state ground" for the judgment unless the court's application of the rule is truly "independent" in the sense that it does not presuppose a resolution of some underlying issue of federal law. International Longshoremen's Assn. v. Davis, supra, 476 U.S. at 388-89; Ake v. Oklahoma, supra, 470 U.S. at 74-75; Xerox Corp. v. Harris County, 459 U.S. 145, 149 (1982); Ivanhoe Irrig. Dist. v. McCracken, 357 U.S. 275, 290 (1958). Thus, where the state law cannot properly be applied unless the federal issue is first resolved in a certain fashion, no "adequate and independent state ground" for the court's decision will be found to exist, and its decision will accordingly be deemed subject to plenary review by this Court. Id. The same result will follow where it appears that the federal and state issues are logically so "interwoven" as to be incapable of independent determination. Ake v. Oklahoma, supra, 470 U.S. at 75; Michigan v. Long, supra, 463 U.S. at 1040-41; Abie State Bank v. Bryan, supra, 282 U.S. at 773; Enterprise Irrig. Dist. v. Farmers Mutual Canal Co.,

243 U.S. 157, 164 (1917).

In the present case, the state court's interpretation of the choice-of-law clause is logically dependent upon and "interwoven" with the resolution of federal issues in at least two important ways. First, as the court of appeal itself concedes in its opinion (JA 66), there is no extrinsic evidence supporting its interpretation of this clause, and that interpretation is therefore completely contingent upon ascertainment of the literal meaning of the operative words "law of the place where the project is located." The meaning of those words, in turn, can only be ascertained by determining what law, in fact, comprises "the law of the place where the project is located." The specific question presented in this case - namely, whether those words encompass federal law as well as state law - can likewise only be resolved by determining whether federal law, in particular, is in fact applicable at that "place." Yet this latter question - whether federal law should properly be deemed to comprise a part of the law applicable at a

certain "place" within the United States - is obviously a federal question. Indeed, it might properly be characterized as the preeminent federal question. U.S. Const., Art. VI, cl. 2. Thus, in the end, the interpretation of the choice-of-law clause is and was necessarily dependent upon a logically prior answer to a quintessential question of federal law. Under the settled rule described above, this conclusion inherently deprives the state court's disposition of this issue of the requisite "independence" without which it cannot be accorded the status of an "adequate and independent state ground" for the court's judgment.

Secondly, the court of appeal's interpretation of the choice-of-law clause embodies an even more fundamental dependence upon an additional aspect of federal law, which consists of the settled rule that any interpretation of a contract determining the arbitrability of a dispute under the Federal Arbitration Act must be infused by a sympathetic attunement to the federal policy

favoring arbitration. This rule was given its most complete exposition in this Court's recent opinion in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., supra, 473 U.S. at 626, where the Court stated, quoting from its earlier opinion in Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., supra:

> "[T]he first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute. The court is to make this determination by applying the 'federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.' Moses H. Cone Mem. Hospital, 460 U.S., at 24. See Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 400-404 (1967); Southland Corp. v. Keating, 465 U.S. 1, 12 (1984). And that body of law counsels
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> 'that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration. ... The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.' Moses H. Cone Memorial Hospital, 460 U.S., at 24-25.
>
> See, e.g., Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-583 (1960). Thus, as with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability."

Since the Arbitration Act is to be uniformly applied "in either state or federal court" (Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., supra, 460 U.S. at 24), the policy enunciated in this passage necessarily pertains to cases arising from state courts as well as federal courts, and so the court has held on more than one occasion. Perry v. Thomas, ___ U.S. ___, 107 S.Ct. 2520, 2525 (1987); Southland Corp. v. Keating, 465 U.S. 1, 10, 15n.7 (1984). See Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., supra, 460 U.S. at 24.

Given the existence of this strong federal policy prescribing the basic methodology of interpretation, no state-court construction of any contractual provision which determines the arbitrability of a dispute subject to the Federal Arbitration Act can ever be truly "independent" of the influence of federal law. At the least, a state court's resolution of this issue is subject to review to the extent of ascertaining whether the terms of the parties' agreement have been "generously construed" in the manner required by the Act

and properly interpreted with the requisite "healthy regard for the federal policy favoring arbitration." Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., supra, 473 U.S. at 626; Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., supra, 460 U.S. at 24.

Since the court of appeal's interpretation of the choice-of-law clause in this case was clearly determinative of the issue of arbitrability (see JA 65), it was therefore directly subject to this federally imposed requirement that arbitration agreements be "generously construed" to promote the policy of the federal Act. The consequent necessity to employ this federal standard in assessing the ultimate correctness of that interpretation thus furnishes a second reason why the court of appeal's ruling on this issue is necessarily dependent upon and "interwoven" with an issue of federal law, and, as such, cannot constitute an "adequate and independent state ground" for the court's judgment.

2. The Court of Appeal's Interpretation of the Choice-of-Law Clause Is Not "Broad Enough to Sustain the Judgment," Because Even the Acceptance of That Interpretation Would Still Leave the Judgment Subject to Reversal on a Separate Federal Ground.

In order to preclude review of a state-court decision by this Court, the state court's resolution of a question of state law must be, not only "independent," but also "adequate" in the sense of being "broad enough to sustain the judgment" without regard to the disposition of any accompanying federal question which the case may present. Enteprise Irrig. Dist. v. Farmers Mutual Canal Co., supra, 243 U.S. at 164. Accord, Xerox Corp. v. Harris County, supra, 459 U.S. at 149; Abie State Bank v. Bryan, supra, 282 U.S. at 773; Ward v. Love County, supra, 253 U.S. at 22-23; Murdock v. City of Memphis, supra, 20 Wall. (87 U.S.) at 636. If the judgment would be susceptible to reversal on federal grounds even if the state court's decision of the state-law issue were left undisturbed, the judgment will be found reviewable despite the lower court's reliance on state-law grounds for its decision. Xerox

Corp. v. Harris County, supra, 459 U.S. at 164; Abie State Bank v. Bryan, supra, 282 U.S. at 773, 775-77; Murdock v. City of Memphis, supra, 20 Wall. (87 U.S.) at 636.

The court of appeal's interpretation of the choice-of-law clause in this case cannot be viewed as "adequate," in this sense, to support its judgment, because, as the court itself acknowledged, Volt's challenge to the application of state law to this dispute extends beyond its disagreement with that interpretation to encompass an additional ground for federal preemption that is not dependent on the construction given to the choice-of-law clause (JA 68; see J.S. App. F, pp. 19-20). Volt contended in the lower courts, and contends here, that even if the court of appeal's interpretation of that clause were to be accepted in its entirety, it would not be effective to prevent preemption of state law because the clause, as so interpreted, would be rendered unenforceable on "public policy" grounds as a violation of the federal policy favoring the enforcement of arbitration

agreements (see J.S. Apps. E, pp. 7-8; F, pp. 19-20). A full demonstration of the substantive validity of this contention must await the argument on the merits. At this point, it is merely sufficient to note that the presence of this additional issue in this case clearly establishes that the court of appeal's interpretation of the choice-of-law clause is not "broad enough to sustain the judgment" without resolution of a separate question of federal law, and that it therefore cannot be treated as "an adequate and independent state ground" that would foreclose review of the judgment by this Court.

3. There Is No "Fair or Substantial Basis" for the Court of Appeal's Interpretation of the Choice-of-Law Clause.

Finally, it is also well settled that, in order to guard against arbitrary denials of federal claims, a further test of "adequacy" must be applied in determining whether a state court's ruling on an accompanying issue of state law presents an "adequate and independent state ground" for its judgment - namely, whether the ruling rests upon a "fair or

substantial basis," or whether, on the other hand, it is so "manifestly wrong" as to present an "unreasonable obstacle" to the protection of rights guaranteed by federal law. Demorest v. City Bank Farmers Trust Co., supra, 321 U.S. at 42; Hale v. Iowa State Board of Assessment, 302 U.S. 95, 101 (1938); Davis v. Wechsler, 263 U.S. 22, 24-25 (1923). Accord, James v. Kentucky, 466 U.S. 341, 348-49 (1984); Lawrence v. State Tax Comm., 286 U.S. 276, 282 (1932); Broad River Power Co. v. South Carolina, 281 U.S. 537, 540 (1930); Ancient Egyptian Order v. Michaux, 279 U.S. 737, 744-45 (1929); Ward v. Love County, supra, 253 U.S. at 22. Cf. Indiana ex rel. Anderson v. Brand, 303 U.S. 95, 100 (1938). See, generally 16 Wright et al., supra, §4026, pp. 731-32; §4029, pp. 750-51; §4030, p. 759.

The application of this standard to the ruling of the court of appeal in this case cannot be fully carried out in advance of the discussion of the merits of the case, since the question whether that ruling rests upon a "fair or substantial basis" is obviously intertwined

with the question of its substantive correctness. One aspect of this question, however, has already been touched upon in the earlier discussion, wherein it was shown that the court's ruling was not based upon any generally accepted principle of state law but instead merely embodied the court's own ipse dixit as to how the choice-of-law clause should be interpreted. Even at this point, therefore, it is possible to draw a tentative conclusion that the court's decision cannot be said to rest upon the sort of "firmly established and regularly followed state practice" without which a "fair or substantial basis" for a state court's decision will not normally be found to exist. James v. Kentucky, supra, 466 U.S. at 348-49. The remaining reasons why the court of appeal's ruling fails to satisfy this standard of adequacy will be developed in the argument on the merits. If that argument should show, as Volt is confident it will, that the court of appeal's construction of the choice-of-law clause is indeed "manifestly wrong," that conclusion will provide a final independently

sufficient reason why the court's resolution of this issue may not be accepted as an "adequate and independent state ground" for its judgment.

It was demonstrated at the outset of this discussion that the court of appeal's interpretation of the choice-of-law clause ultimately presents a federal question to which the doctrine of "adequate and independent state ground" has no application. It has now been shown that even if that interpretation should be viewed as based on state law, this doctrine will not insulate the court of appeal's judgment from review in any event, because the grounds for the judgment are neither "independent" nor "adequate" within the meaning that has been given to these terms in the decisions of this Court applying the doctrine. For all these reasons, it is clear that this jurisdictional limitation presents no obstacle to the Court's acceptance of jurisdiction to decide this appeal.

II. There Is No Serious Controversy That the Federal Arbitration Act Would Require Arbitration of the Parties' Present Dispute if the Choice-of-Law Clause in the Contract Were Not Interpreted to Foreclose the Application of the Act to This Case.

The Court's jurisdiction being thus assured, it is now appropriate to address the merits of the appeal. Before turning directly to an analysis of the principal issues presented by this case, however, it is first necessary to demonstrate that these issues are indeed dispositive of the outcome of this suit and hence squarely presented for decision on this appeal. This demonstration will involve nothing more than the brief statement of certain familiar propositions regarding the general applicability of the Federal Arbitration Act. Taken together, these propositions establish that, unless the choice-of-law clause in the parties' contract were found to dictate a different result, the federal Act would govern the disposition of the case and would require that Stanford be compelled to arbitrate its dispute with Volt, notwithstanding the conflicting dictates of the state statute that was relied upon by the courts

below to relieve Stanford of its obligation in this regard.

First of all, it is by now well settled that the Federal Arbitration Act creates a comprehensive body of substantive law governing all arbitrations arising out of transactions affecting interstate commerce, and that its provisions are therefore required to be enforced in state courts, as well as federal courts, to the exclusion of any conflicting provisions of state law. Perry v. Thomas, supra, 107 S.Ct. at 2525; Southland Corp. v. Keating, supra, 465 U.S. at 12; Moses H. Cone Mem. Hosp. v. Mercury Constr. Co., supra, 460 U.S. at 24. As this Court stated in the often quoted passage from its opinion in Moses H. Cone Mem. Hosp. v. Mercury Constr. Co., supra, the Act "create[s] a body of federal substantive law of arbitrability applicable to any arbitration agreement within the coverage of the Act," which "governs that issue in either state or federal court ... notwithstanding any state substantive or procedural policies to the contrary." Id., 460 U.S. at 24.

Secondly, it is equally clear that if the federal Act were to be applied to this case, its application would necessarily mandate judicial enforcement of Stanford's agreement to arbitrate its dispute with Volt, and would thus require reversal of the decisions of the courts below denying Volt's petition for that relief. As noted earlier, and as the court of appeal's opinion makes clear, the sole basis for those decisions was the provision of section 1281.2(c) of the California Code of Civil Procedure that authorizes denial of a petition to compel arbitration where related non-arbitrable claims have been asserted against third parties in a pending lawsuit. The Federal Arbitration Act contains no counterpart provision permitting avoidance of an arbitration agreement in these circumstances, and the decisions of the state and federal courts applying the Act have therefore unanimously held that the existence of such non-arbitrable third-party claims does not afford a proper ground for denying or staying the enforcement of such an agreement. Moses H. Cone Mem. Hosp.

v. Mercury Constr. Co., supra, 460 U.S. at 19-20; C.Itoh & Co. v. Jordan Intl. Co., 552 F.2d 1228, 1231 (7th Cir. 1977); Acevedo Maldonado v. PPG Industries, Inc., 514 F.2d 614, 617 (1st Cir. 1975); Hamilton Life Ins. Co. v. Republic Natl. Life Ins. Co., 408 F.2d 606, 609 (2d Cir. 1969); Hilti, Inc. v. Oldach, 392 F.2d 368, 369n.2 (1st Cir. 1968); Liddington v. The Energy Group, Inc., 238 Cal.Rptr. 202, 207 (Cal.App. 1987); R.J. Palmer Constr. Co. v. Wichita Band Instr. Co., 642 P.2d 127, 131 (Kan.App. 1982); Episcopal Housing Corp. v. Federal Ins. Co., 239 S.E.2d 647, 652 (S.C. 1977). Cf. Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218-21 (1985) (arbitration compelled despite "intertwining" of arbitrable and non-arbitrable claims). If applied in this case, this settled federal rule would clearly preempt the directly conflicting prescriptions of section 1281.2(c) and hence eliminate the only legal basis for the denial of Volt's petition. As the court of appeal itself acknowledged, it is thus "apparent that were the federal rules to apply, Volt's petition to

compel arbitration would have to be granted" (JA 65).

Finally, there is no question that, unless otherwise dictated by the choice-of-law clause, federal law would indeed govern the disposition of this case, because the arbitration agreement at issue here clearly "evidenc[es] a transaction involving ... commerce among the several states" within the meaning of the provisions of the federal Act defining the scope of its coverage. 9 U.S.C. §§1-2. Volt established by uncontradicted evidence in the trial court that a large proportion of its manpower and equipment was transferred or shipped to California from other states for use on the Stanford project, and that the project was administered from Volt's offices outside California (JA 55-56). Under the standards enunciated in the case law on this issue, these facts clearly establish a sufficient nexus with interstate commerce to bring this transaction well within the purview of the federal Act. Prima Paint Co. v. Flood & Conklin, 388 U.S. 395, 401 (1967); Del E. Webb Const. Co. v. Richardson

Hosp. Auth., 823 F.2d 145, 147-48 (5th Cir. 1987); In re Mercury Constr. Corp., 656 F.2d 933, 942 (4th Cir. 1981), affd. sub nom. Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., supra, 460 U.S. 1 (1983); Pathman Const. Co. v. Knox Cty. Hosp. Assn., 326 N.E.2d 844, 848-51 (Ind.App. 1975); Episcopal Housing Corp. v. Federal Ins. Co., supra, 239 S.E.2d at 650-52.

All of these settled propositions were apparently accepted by the court of appeal, and in fact have never been seriously contested by Stanford itself.* It follows that the only remaining issue standing in the way of a

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* This description of Stanford's position must be qualified in one minor respect. In its brief in the court of appeal, Stanford attempted, somewhat obliquely, to cast some doubt on the general applicability of the remedial provisions of the federal Act in state courts by pointing to an admittedly somewhat puzzling footnote in the opinion of this Court in Southland Corp. v. Keating, supra, 465 U.S. 1, where the Court, in the course of responding to one of the points made by the dissenting justice, had suggested that the sections of the Act specifying the methods for enforcing arbitration agreements might not be specifically applicable in state trial courts (Stanford's Brief filed in the court below April 6, 1987, pp. 12-13, citing Southland, supra, 465 U.S. at 16n.10). In its reply brief, Volt responded to this argument by demonstrating at considerable length (contd.)

determination that the state statute relied upon by the courts below was indeed preempted by the Federal Arbitration Act, and that Volt's petition to compel arbitration pursuant to the Act should therefore have been granted, is the question whether the application of the federal Act to this case is precluded by the choice-of-law clause in the parties' agreement. That question, in turn, resolves itself into two

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(footnote contd.) that the actual holdings of this Court, including the holding in Southland itself, as well as the decisions of many state and lower federal courts on the issue, had clearly established that the remedies and procedures prescribed by the federal Act, whether by virtue of these particular sections or otherwise, were enforceable in state courts as well as in federal courts (Volt's Reply Brief, filed May 22, 1987, pp. 15-34). This entire debate was ultimately mooted by another decision of this Court handed down after the filing of the briefs but before the oral argument in the court of appeal. In that decision, Perry v. Thomas, supra, 107 S.Ct. 2520, the Court effectively held, by specifically enforcing a petition to compel arbitration brought in a California superior court under the very sections of the Act referred to in the Southland footnote, that these procedural provisions of the federal Act were indeed fully applicable in state courts. Id., 107 S.Ct. at 2523 and n.1. As the court of appeal apparently assumed in its opinion in this case, this intervening decision of this Court has effectively eliminated any serious possibility of further controversy over this point.

further questions - namely, (1) whether the terms of the choice-of-law clause may properly be interpreted to have this preclusive effect, and (2), if so, whether the clause may be validly enforced consistently with the federal public policy favoring the arbitration of private disputes. These two questions are the subjects of the remainder of this brief.

III. For No Less Than Six Independently Sufficient Reasons, The Choice-of-Law Clause Must Be Interpreted to Permit, Indeed to Require, Application of the Federal Arbitration Act to This Transaction.

A. To Interpret a Choice-of-Law Clause as Foreclosing the Application of Federal Law Is Discordant with the Common Understanding of the Function of Such Clauses.

The first of many reasons why the choice-of-law clause in the Volt-Stanford contract may not be interpreted to preclude application of federal law to this case is that such an interpretation initially embodies an altogether anomalous conception of the scope of "choice of law" in general and the function of choice-of-law clauses in particular. Neither the Restatement of Conflict of Laws nor most of the hornbooks on this subject purport to cover the

topic of federal supremacy or the problem of conflicts or choices between federal and state law. E.g., Restatement, Conflict of Laws (2d) (1971); Ehrenzweig, Conflict of Laws (1962); Siegel, Conflicts (1982).* Rather, these commentaries are primarily occupied with analyses of the issues presented by conflicts between the laws of the different states and of other coequal sovereigns. Id.. What is true of these commentaries in general is also true of the particular sections therein that are specifically addressed to the treatment of contractual choice-of-law provisions, none of which discusses issues of federal preemption or conflicts between state and federal laws. Restatement, supra, §§187, 203; Ehrenzweig, supra at 455-58; Siegel, supra at 211-15. The implication is clear that the common

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* For example, the only reference to this type of problem that appears in the Restatement consists of a general comment to the effect that the Supremacy Clause may "limit the power of the States" in applying their choice-of-law rules. Restatement, supra, §2, comment b. Beyond this, the Restatement expressly provides that the relations between state and federal law "are not dealt with in the Restatement of this subject." Id., §3, comment c.

understanding of the coverage of this subject and of the function of these kinds of clauses simply does not encompass federal-state relations or the resolution of conflicts between state law and the preemptive provisions of federal law.

Even more graphic evidence of this common perception is provided by the apparently very substantial proportion of the cases involving both contractual choice-of-law provisions and issues of federal supremacy in which both the courts and the litigants have simply failed to notice any connection between these two subjects. In a later section of this brief, Volt will describe the entire body of case law holding, with virtual unanimity, that a choice-of-law clause may not be applied to foreclose the application of the Federal Arbitration Act. What is noteworthy for present purposes, however, is that a remarkably large number of these decisions, in fact a near majority, have reached this result sub silentio, by simply proceeding to resolve the issue of the applicability of the federal Act without

reference to the choice-of-law provision and without revealing any awareness whatever that such a provision might have any bearing at all upon this issue. E.g., Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974); Bernhardt v. Polygraphic Co., 350 U.S. 198 (1956); Del E. Webb Constr. Co. v. Richardson Hosp. Auth., 823 F.2d 145 (5th Cir. 1987) (involved AIA Document A201, containing the same choice-of-law clause as the one at issue here); Wasyl, Inc. v. First Boston Corp., 813 F.2d 1579 (9th Cir. 1987); LaFarge Conseils et Etudes, S.A. v. Kaiser Cement & Gypsum Corp., 791 F.2d 1334 (9th Cir. 1986); Hilti, Inc. v. Oldach, supra, 392 F.2d 368; Ford v. Shearson Lehman Amer. Express Co., 225 Cal.Rptr. 895 (Cal.App. 1986); ADC Constr. Co. v. McDaniel Grading, Inc., supra, 338 S.E.2d 733 (AIA Document A201); Atlantic Painting & Contracting, Inc. v. Nashville Bridge Co., 670 S.W.2d 841 (Ky. 1984); Pinkis v. Network Cinema Corp., 512 P.2d 751 (Wash. App. 1973). See also Collins Radio Co. v. Ex-Cell-O Corp., 467 F.2d 995, 997 (8th Cir. 1972) (opining that federal law should apply despite

choice-of-law clause without stating any rationale for this conclusion); TAC Travel Amer. Corp. v. World Airways, Inc., 443 F.Supp. 825, 827 (S.D.N.Y. 1978) (semble); Liddington v. The Energy Group, 238 Cal.Rptr. 202 (Cal. App. 1987) (semble). If these cases arising under the Arbitration Act may be taken as a fair sample, it must be concluded that the case law fully substantiates the observation that the idea of treating a choice-of-law clause as dispositive of an issue of federal preemption is quite foreign to the normal perception of a good many courts and counsel.

As the preceding citation indicates, two of the decisions exemplifying this point are decisions of this Court. Thus, in Scherk v. Alberto-Culver Co., supra, 417 U.S. 506, the Court applied the Federal Arbitration Act to compel arbitration of a dispute involving alleged securities violations committed during the performance of a contract that specified that it should be governed by "the laws of the State of Illinois." Id., 417 U.S. at 508. Although the Court referred to this clause in

another connection in its opinion (id. at 519n.13), it failed to ascribe any significance to the clause in the course of its consideration of the applicablity of either the Arbitration Act or the federal securities laws. Id., 417 U.S. at 510-12, 519-20. Similarly, in Bernhardt v. Polygraphic Co., supra, 350 U.S. 198, where the contract provided that it should be governed by the laws of the State of New York, the Court based its decision that the Federal Arbitration Act was inapplicable to the case solely on the ground of an absence of interstate commerce, and mentioned the choice-of-law clause only in connection with its possible relevance to the resolution of a conflict between New York law and the law of Vermont. Id., 350 U.S. at 200-2, 205; see the opinion below, 218 F.2d at 949-50.*

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* This Court also applied the Federal Arbitration Act without considering the bearing of a choice-of-law clause on the applicability of the Act in its recent decision in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., supra, 473 U.S. 614. However, since the clause in that case designated the law of a foreign nation rather than an American state as the governing law, the decision is not directly relevant to the present discussion. (contd.)

Thus, the decisions of this Court, as well as the decisions of numerous lower courts and the contents of both the Restatement and the standard treatises on the subject, amply illustrate that choice-of-law clauses are typically perceived as relevant only to conflicts between the laws of different states, and are not customarily viewed as encompassing preemption problems or as purporting to resolve

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(footnote contd.) Id., 473 U.S. at 637n.19. More to the point in this context is the decision of the Court in United States v. Kimbell Foods, Inc., supra, 440 U.S. 715, which, though it did not involve the Arbitration Act, furnishes another example of the Court's apparent assumption that a choice-of-law clause should not normally be viewed as pertinent to an issue of federal preemption. The parties' contract in that case contained a clause expressly designating "the laws of the State of Texas" as the governing law (see the opinion below, 557 F.2d at 498n.8), but the Court nevertheless proceeded to address and resolve a difficult preemption issue without even mentioning the existence of this contractual provision, let alone the possibility that it might have a bearing on this issue. Id.. The only case in which the Court has ever expressly considered the relevance of a choice-of-law clause to an issue of federal preemption is Fidelity Federal S. & L. Assn. v. de la Cuesta, supra, 458 U.S. 141, where the Court flatly rejected the suggestion that the application of federal law might be foreclosed by such a provision. Id., 458 U.S. at 157n.12. This decision will be more fully discussed below.

conflicts between state and federal law. Admittedly, the fact that these provisions are not normally regarded as serving this latter purpose does not, in and of itself, establish that the specific choice-of-law clause at issue here might not be found to fulfill that function in this case. This fact does suggest, however, that such a finding would run counter to the accepted usage of these clauses, and that it could therefore be justified only by reasonably clear evidence that such an unusual result was actually contemplated by the parties. In the ensuing discussion, Volt will demonstrate that neither the language of the contract nor the available evidence of the parties' intent even remotely approaches justifying such a finding. Indeed, it will be shown that the record compels the precisely contrary conclusion - that is, that the choice-of-law clause in this agreement was specifically intended not to encompass any issue of federal preemption or to foreclose the application of otherwise applicable federal laws to this transaction.

B. The Literal Terms of the Parties' Contract Refute the Contention That It Was Intended to Preclude the Application of Federal Law to This Transaction.

At the risk of belaboring the obvious, it is important to note at the outset that the choice-of-law clause at issue here does not contain any express language indicating that the contract shall be governed exclusively by the state law of California. Indeed, it does not even expressly refer to the law of California, or even to the law of the "state" where the transaction is to be performed. Instead it simply provides that "The Contract shall be governed by the law of the place where the project is located" (JA 37). Insofar as this case turns on strict interpretation of the contractual language, therefore, the question to be resolved is whether the phrase "law of the place where the project is located" somehow conveys an unstated implication that the transaction should be governed solely by state law to the exclusion of otherwise applicable federal statutes. As will now be shown, the answer to this question is emphatically negative.

The term, "place where the project is located," literally refers, not only to the State of California, but also to the City of Palo Alto, the County of Santa Clara, and the nation of the United States of America. All of these political entities have laws and ordinances that are applicable in one way or another at the "place" where this project was performed. The only literally correct interpretation of the phrase "law of the place where the project is located," therefore, is that it constitutes a collective reference to the laws of all of these entities within whose boundaries the project was in fact situated. Under that interpretation, the phrase would clearly encompass all laws of the federal government that would otherwise apply to any of the activities occurring during the course of the project. Thus, on its face, the operative contractual language not only does not preclude, but instead clearly seems to require, the application of federal law to this transaction.

This conclusion is reinforced by an

examination of the terms of the contract as a whole, which likewise clearly imply an intention that federal law was meant to apply to this project. To take but the most obvious examples, two of the other sections of the contract require the contractor to "pay all sales, consumer, use and other similar taxes" applicable to his work, and to "comply with all applicable laws, ordinances, rules, regulations and lawful orders of any public authority bearing on the safety of persons or property" at the project site (JA 37, 39). It is inconceivable that these provisions were intended to compel the contractor's compliance only with laws enacted at the state level and to leave him free to ignore all taxes and safety regulations, such as the rules of federal OSHA, that have been promulgated by the federal government and are otherwise clearly applicable to this type of project. Yet this would be precisely the result of interpreting the choice-of-law clause as precluding the application of federal law to the interpretation and performance of this contract.

It follows that the contract must be construed as incorporating federal law among the laws applicable to this transaction, not only by virtue of the literal command of the choice-of-law provision itself, but also to ensure a consistent and sensible construction of the entirety of the parties' agreement.

C. As This Court Held with Regard to a Virtually Identical Provision in the de la Cuesta Case, the Basic Tenets of Federalism Likewise Dictate That the Term "Law of the Place Where the Project Is Located" Must Be Construed to Encompass Federal as Well as State Law.

The conclusion that federal law necessarily falls within the compass of the phrase "law of the place where the project is located" is also dictated by a consideration of the basic tenets of American federalism. It is a rudimentary precept of our constitutional system that federal law constitutes an integral part of the law of every state and of every "place" within the federal union. This fundamental idea is as old as the Constitution itself and has been reaffirmed many times in the opinions of this Court. The Federalist, Nos. 16, 27; Fidelity Federal S. & L. Assn. v. de la Cuesta, supra,

458 U.S. at 157; Testa v. Katt, 330 U.S. 386, 392-93 (1947); Mondou v. New York, N.H. & Hartford R.R. Co. (Second Employers Liability Act Cases), 223 U.S. 1, 57-58 (1912); Hauenstein v. Lynham, 100 U.S. 483, 490 (1880); Claflin v. Houseman, 93 U.S. 130, 136-37 (1876). One of the most perspicuous statements of this elementary doctrine of federalism was provided more than a hundred years ago by Mr. Justice Bradley in his opinion for a unanimous Court in Claflin v. Houseman, supra, where he said (id., 93 U.S. at 136-37):

> "The laws of the United States are laws of the several States, and just as much binding on the citizens and courts thereof as the state laws are. The United States is not a foreign sovereignty as regards the several states, but is a concurrent and, within its jurisdiction, paramount sovereignty. Every citizen of a state is a subject of two distinct sovereignties, having concurrent jurisdiction in the State; concurrent as to place and persons, though distinct as to subject matter."

To the same general effect is the later statement of Mr. Justice Swayne in his opinion, also for a unanimous Court, in Hauenstein v. Lynham, supra, 100 U.S. 483, where he observed that "the Constitution, laws and treaties of the United States are as much a part of the law of

every state as its own local laws and Constitution." Id., 100 U.S. at 490.

If the literal language of the choice-of-law provision in the present contract were not itself sufficient to compel this result, this settled constitutional principle would plainly require that the phrase "law of the place where the project is located" be construed to encompass the application of federal law to this project. Given the fact that the project was, after all, "located" within the boundaries of one of the states of the United States, the only way that federal law could be excluded from the scope of the operative contractual term would be to conclude that federal law is not in fact a part of "the law of" that state or that "place." Under the principle just described, such a conclusion is inadmissible as a matter of basic constitutional law. The very nature of our constitutional system, as well as the language of the contract, thus compels a construction of the choice-of-law clause that would encompass the application of federal law to this transaction.

This very analysis of this issue was in fact recently applied by this Court to justify precisely this interpretation of a nearly identical choice-of-law clause in its decision in Fidelity Federal S. & L. Assn. v. de la Cuesta, supra, 458 U.S. 141. That decision, as noted earlier, sustained a preemption challenge to a rule of California law invalidating "due on sale" clauses in certain mortgages issued by federally chartered lending institutions. One of the arguments that had been been offered in defense of the state rule and accepted by the state courts was a contention that federal law was itself rendered inapplicable to these mortgages by a choice-of-law clause in the mortgages which specified that their application should be "governed by the law of the jurisdiction in which the property is located." Id., 458 U.S. at 148, 150-51. The Court disposed of that argument in a footnote to a passage of its opinion in which it had reaffirmed, quoting from the opinion in Hauenstein v. Lynham, supra, the fundamental principle that federal law is "'as much a part

of the law of every state as its own local laws and Constitution.'" Id. at 157. In that footnote, the Court stated (id. at 157n.12):

> "This principle likewise leads us to reject appellees' contention that, with respect to the two deeds of trust containing ¶15 [the choice-of-law provision], appellants did in fact agree to be bound by local law. Paragraph 15 provides that the deed is to be governed by the 'law of the jurisdiction' in which the property is located; but the 'law of the jurisdiction' includes federal as well as state law."

This Court itself has thus expressly confirmed the conclusion that a choice-of-law clause of the kind at issue here, whatever interpretation of its literal terms might have been adopted by the state courts, simply cannot be construed as excluding the operation of otherwise applicable federal laws without offending the most basic principles of our federal scheme of government.

D. The Only Evidence in the Record Regarding the Intent of the Parties Suggests That the Federal Arbitration Act Was Intended to Govern the Resolution of Disputes Arising Under the Contract.

Notwithstanding all of the foregoing considerations, an argument might still be constructed that the choice-of-law clause might be susceptible to the interpretation placed upon it by the court of appeal if it clearly

appeared from the evidence that such an otherwise bizarre and unacceptable interpretation was actually contemplated by the parties at the time they entered into the contract. Indeed, the opinion of the lower court, by its repeated assertions that the parties "chose" to be governed exclusively by California law (JA 66, 72, 76), seems to intimate that the court somehow managed to divine such an underlying intention of the parties. In fact, however, even assuming arguendo that proof of such intent would be permitted to override the plain meaning of the contractual language, any such possibility is foreclosed in this case by the total absence of any such proof in the record. In fact, as will now be shown, what little evidence exists on this subject suggests, if anything, that the parties' intention, at least with respect to the specific issue of arbitrability that is presented by this case, was precisely the opposite of the one attributed to them by the court of appeal.

The court of appeal itself acknowledges in its opinion that neither party presented any

direct evidence of the intent that underlay the adoption of the choice-of-law clause (JA 66). Indeed, since the personnel who executed the contract were business executives and not lawyers (JA 33), it may fairly be presumed that they had no clear idea of the potential significance of their adoption of this clause, either in general or with respect to the specific issue of the enforceability of the contract's arbitration clause that has now arisen in this case.

The circumstances do suggest, however, that Stanford at least was quite aware of the terms and requirements of the arbitration clause itself, since, as indicated in the Statement of the Case, this clause was prepared by Stanford as a substitute for the standard-form clause ordinarily used with this form of agreement (JA 40). As was also noted above, the adoption of this provision reflected a clear awareness on Stanford's part of the possibility of simultaneous disputes with the several participants in the project and the consequent problem of duplicative litigation (id.; compare JA 37-38).

Stanford could easily have dealt with this problem by inserting a proviso expressly excusing it from its duty to arbitrate in the event of such disputes with non-parties to the agreement. See e.g., Garden Grove Comm. Church v. Pittsburgh Des Moines Steel Co., supra, 191 Cal.Rptr. at 17. It deliberately chose not to do this, however, and instead adopted a provision that expressly preserved its duty to arbitrate notwithstanding the pendency of such third-party disputes, subject only to the possibility that Volt might be required to consolidate the arbitration of its claim with other pending arbitrations arising out of the transaction (JA 40).

Thus, to the extent the evidence indicates anything about the parties' intent, it shows that Stanford fully intended to proceed with arbitration of its dispute with Volt despite the problem posed by the existence of potential claims against other parties. Since this is precisely the result that would be mandated by federal law and frustrated by the application of state law to the present dispute, this

evidence, if anything, ultimately supports the conclusion that federal law should govern this controversy. At all events, it clearly forecloses any argument that the court of appeal's aberrant reading of the choice-of-law clause might somehow be justified on the basis of some notion that the parties consciously intended or "chose" to forbid the application of federal law to the resolution of disputes arising under their agreement.

E. The Overwhelming Weight of Authority, Both in This Court and in the Lower Courts, Supports the Conclusion That a Choice-of-Law Provision of the Kind at Issue Here Does Not Affect the Application of Federal Law to the Parties' Transaction.

The court of appeal's construction of the choice-of-law clause contravenes, not only the language of the contract, the evidence of the parties' intent, and the basic principles of federalism, but also the overwhelming weight of the prior decisional law on this issue. The decisions of this Court on the issue have already been described above. As was there shown, the Court has squarely held, in its decision in Fidelity Federal S. & L. Assn. v. de la Cuesta, supra, 458 U.S. 141, that a

virtually identical choice-of-law provision could not be construed to foreclose the application of otherwise applicable federal law or to shield conflicting state laws from federal preemption. As was also noted above, the Court has reached this same result sub silentio on two other occasions by simply disregarding the effect of similar choice-of-law provisions in the course of determining the applicability of the Federal Arbitration Act to the parties' transactions. Scherk v. Alberto Culver Co., supra, 417 U.S. 506; Bernhardt v. Polygraphic Co., supra, 350 U.S. 198.

The decisions of the lower courts likewise overwhelmingly reject the notion that the application of the Arbitration Act may be precluded by a choice-of-law clause in the parties' contract. These courts have justified their decisions to this effect by a variety of alternative rationales, which generally correspond to the various reasons for this result that have been offered in the earlier discussion. Thus, some courts, addressing contractual provisions identical to the one at

issue here, have simply held that the words, "law of the place where the project is located," literally encompass federal as well as state law. Episcopal Housing Corp. v. Federal Ins. Co., 239 S.E.2d 647, 650n.1 (S.C. 1977). See also Huber, Hunt & Nichols v. Architectural Stone Co., 625 F.2d 22, 25n.8 (5th Cir. 1980). Certain other decisions, involving choice-of-law clauses designating the law of a particular named state, have relied on the reasoning later adopted by this Court in its opinion in the de la Cuesta case, supra, to the effect that any reference to the law of a state of the United States must be deemed to include federal law. Burke County Public Schools v. The Shaver P'ship., 279 S.E.2d 816, 823, 825 (N.C. 1981); Mamlin v. Susan Thomas, Inc., 490 S.W.2d 634, 637 (Tex.Civ.App. 1973). See also Commonwealth Edison Co. v. Gulf Oil Corp., 541 F.2d 1263, 1270 (7th Cir. 1976) (quoting Mamlin, supra); Tennessee River Pulp & Paper Co. v. Eichleay Corp., 637 S.W.2d 853, 857 (Tenn. 1982) (citing Mamlin). A third, much larger group of decisions, as noted above,

have implicitly expressed the general perception that choice-of-law clauses are not even relevant to the applicability of federal law, by simply proceeding to apply the Federal Arbitration Act in the face of such a clause without even bothering to state reasons for their holdings to this effect. E.g., Del E. Webb Constr. Co. v. Richardson Hosp. Auth., supra, 823 F.2d 145 (involved AIA Document A201, containing the same choice-of-law clause as the one at issue here); Wasyl, Inc. v. First Boston Corp., supra, 813 F.2d 1579; LaFarge Conseils et Etudes, S.A. v. Kaiser Cement & Gypsum Corp., supra, 791 F.2d 1334; Collins Radio Co. v. Ex-Cell-O Corp., supra, 467 F.2d 995; Hilti, Inc. v. Oldach, supra, 392 F.2d 368; TAC Travel Amer. Corp. v. World Airways, Inc., supra, 443 F.Supp. 825; Liddington v. The Energy Group, Inc., supra, 238 Cal.Rptr. 238; Ford v. Shearson Lehman Amer. Express Co., supra, 225 Cal.Rptr. 895; ADC Constr. Co. v. McDaniel Grading, Inc., supra, 338 S.E.2d 733 (AIA Document A201); Atlantic Painting & Contracting, Inc. v. Nashville Bridge Co.,

supra, 670 S.W.2d 841; Pinkis v. Network Cinema Corp., supra, 512 P.2d 751. Finally, a number of decisions have held that, regardless of whether a choice-of-law provision might be interpreted as excluding federal law, it could not be applied to accomplish that result where this would prevent enforcement of the parties' arbitration agreement, because such an outcome would offend the basic policy of the federal Act favoring the arbitration of private disputes.* Commonwealth Edison Co. v. Gulf Oil Corp., supra, 541 F.2d at 1269; Paul Allison, Inc. v. Minikin Storage, Inc., 486 F.Supp. 1, 3 (D.Neb. 1979); State ex rel. St. Joseph Light & Power Co. v. Donelson, 631 S.W.2d 887, 891-92 (Mo.App. 1982). See also Mesa Operating Ltd. P'ship. v. Intrastate Gas Comm., 797 F.2d 238, 243-44 (5th Cir. 1986) (relying on Commonwealth

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* This latter rationale for applying federal law despite the parties' adoption of a choice-of-law clause will be discussed in more detail in a later section of the brief, where Volt will demonstrate that even if the court of appeal's interpretation of the clause at issue here should be accepted, it would not foreclose the application of federal law because the result of that interpretation would simply be to render the clause invalid.

Edison, supra); Huber, Hunt & Nichols, Inc. v. Architectural Stone Corp., supra, 625 F.2d at 25n.8 (semble); Cone Mills Corp. v. August F. Nielsen Co., 455 N.Y.S.2d 625, 627 (N.Y.Sup.Ct. 1982) (semble).

Arrayed against this imposing panoply of three decisions of this Court and more than twenty decisions of the lower federal and state courts rejecting the result reached by the court of appeal in this case is a meager minority of only two contrary decisions,* which have held, like the court of appeal, that the inclusion of a choice-of-law clause in the parties' contract effectively forecloses reliance on the Federal Arbitration Act and

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* Besides the two cases mentioned here, the opinion of the court of appeal cites two additional decisions as support for its holding on this issue (JA 67, citing Eric A. Carlstrom Const. Co. v. Independent School Dist. No. 77, 256 N.W.2d 479 (Minn. 1977), and Lane-Tahoe, Inc. v. Kindred Const. Co., 536 P.2d 491 (Nev. 1975)). With due respect to the court of appeal, the fact is that neither of these latter decisions has any bearing whatever on this issue. In both cases, the choice-of-law clause was referred to only as a basis for selecting between the laws of different states. The possible application of federal law to the issue of arbitrability was not even raised or considered by the court in either case.

requires resolution of the issue of arbitrability in exclusive accordance with state law. Garden Grove Comm. Church v. Pittsburgh Des Moines Steel Co., supra, 191 Cal.Rptr. at 18; Standard Co. of New Orleans v. Elliott Const. Co., supra, 363 So.2d at 677. Besides their extreme minority status, both of these decisions are distinguishable from this case in any event, since the application of state law in each case ultimately resulted in enforcement of the parties' arbitration agreement to the same extent that it would have been enforceable under federal law. Garden Grove, supra at 23; Standard Co., supra at 676-77. Thus, in the end, it must be concluded that the court of appeal's decision, besides being wrong from every other point of view, is essentially devoid of authoritative support and indeed flatly contrary to established precedent.*

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* For purposes of assessing whether the court of appeal's holding rests upon a "fair or substantial basis" for jurisdictional purposes, it is also worth noting that its decision appears to contravene, not only the general law, but also the law of California on the issue it addresses. Although the decision admittedly derives some support (continued)

F. At All Events, Any Ambiguity That Might Exist in the Terms of the Choice-of-Law Clause Would Have to Be Resolved in Favor of the Application of Federal Law, Pursuant to the Settled Federal Rule That Arbitration Agreements Must Be "Generously Construed" to Promote "the Federal Policy Favoring Arbitration."

Even if one were to disregard all of what has been said above and return to the literal words of the choice-of-law clause as if to a tabula rasa, the most that could be offered by way of an argument in defense of the court of appeal's interpretation of that clause is that

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(footnote contd.) from the similar, though distinguishable, holding of the California court of appeal in Garden Grove Comm. Church v. Pittsburgh Des Moines Steel Co., supra, 191 Cal.Rptr. 15, it is also flatly contradicted by the more recent decisions of two other California appellate courts, one of which squarely holds, albeit without extended discussion, that a choice-of-law clause does not preclude application of the Federal Arbitration Act, and the other of which reaches this same result sub silentio. Liddington v. The Energy Group, supra, 238 Cal.Rptr. at 204, 207; Ford v. Shearson Lehman Amer. Express Co., supra, 225 Cal.Rptr. at 896, 897. The California Supreme Court itself has never specifically addressed this issue, except insofar as it may be considered to have done so by disapproving the publication of the court of appeal's opinion in this case (JA 87). It has, however, wholeheartedly embraced, on several occasions, the general principle that "'[t]he legislation of Congress is a portion of the law of each state.'" Miller v. Municipal Court, 142 P.2d 297, 314-15 (Cal. 1943). Accord Gerry (contd.)

the phrase "law of the place where the project is located" might be characterized as ambiguous with respect to its inclusion of federal law. In that event, one would need to resort either to extrinsic evidence of the parties' intent or to some preferential rule of construction in order to resolve the ambiguity. As the court of appeal has itself acknowledged (JA 66), there is no extrinsic evidence of intent, other than the evidence referred to above generally indicating that the parties intended their arbitration agreement to be enforced despite the pendency of litigation with third parties. There is, however, a very compelling rule of construction, derived from the policy of the Federal Arbitration Act itself, which would

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(footnote contd.) of California v. Superior Court, 194 P.2d 689, 692 (Cal. 1948); Estate of Lindquist, 154 P.2d 879, 883 (Cal. 1944); Leet v. Union Pacific R.R. Co., 155 P.2d 42, 46 (Cal. 1944). It is difficult to imagine that a court having espoused this principle could bring itself to acquiesce in the court of appeal's misguided conclusion that a contractual reference to "the law of the place where the project is located" must be construed to exclude otherwise applicable federal law with respect to a project located in the state of California.

readily serve to resolve this ambiguity, and which, as will now be shown, would require that it be resolved in favor of the application of federal law to this dispute.

The rule of construction referred to is the rule laid down by this Court, in its several recent decisions applying the Arbitration Act, to the effect that any ambiguities in arbitration agreements within the coverage of the Act should generally be resolved in such a way as to favor arbitration of the parties' dispute. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., supra, 473 U.S. at 626; Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp, supra, 460 U.S. at 24-25. See Perry v. Thomas, supra, 107 S.Ct. at 2525; Southland Corp. v. Keating, supra, 465 U.S. at 10. This rule has already been described at some length above. As was there noted, the rule requires that all such agreements be "generously construed" in a manner reflecting "a healthy regard for the federal policy favoring arbitration," and that any doubt regarding the enforceability of the agreement

"should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., supra, 473 U.S. at 626; Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp, supra, 460 U.S. at 24-25.

Application of this rule of interpretation to the contractual provision at issue in this case would plainly dictate that any ambiguity in the phrase "law of the place where the project is located" be resolved in favor of the inclusion of federal law within the scope of that provision, because only federal law would permit enforcement of the parties' agreement to arbitrate their present dispute and thus satisfy "the federal policy favoring arbitration." Moses H. Cone Mem. Hosp. v. Mercury Constr. Co., supra, 460 U.S. at 24. This settled rule thus furnishes a final conclusive reason for requiring this result, which would be sufficient in itself to compel reversal of the court of appeal's contrary ruling on this issue even

apart from the several additional reasons supporting that outcome that have been adduced in the course of the preceding discussion.

IV. Even if the Court of Appeal's Interpretation of the Choice-of-Law Clause Were to Be Accepted, the Application of Federal Law to This Transaction Would Still Be Required, Because That Interpretation Would Render the Clause Unenforceable as a Violation of Federal Public Policy.

A. The Principle Is Well Established in All Courts, Including This One, That a Choice-of-Law Clause Will Not Be Enforced Where Its Enforcement Would Lead to a Violation of a Fundamental Public Policy of the Jurisdiction Whose Law Would Otherwise Apply to the Transaction.

In the earlier discussion, it was noted that a number of lower federal and state courts have ruled that any choice-of-law clause that might be interpreted to foreclose reliance on the Federal Arbitration Act should be held invalid if it would thereby prevent enforcement of the parties' arbitration agreement, because this result would contravene the federal policy favoring the arbitration of private disputes. Commonwealth Edison Co. v. Gulf Oil Corp., supra, 541 F.2d at 1269; Paul Allison, Inc. v. Minikin Storage, Inc., supra, 486 F.Supp. at 3; State ex rel. St. Joseph Light & Power Co. v.

Donelson, supra, 631 S.W.2d at 891-92. See also Mesa Operating Ltd. P'ship. v. Intrastate Gas Comm., supra, 797 F.2d at 243-44 (citing Commonwealth Edison, supra); Huber, Hunt & Nichols, Inc. v. Architectural Stone Corp., supra, 625 F.2d at 25n.8 (semble); Cone Mills Corp. v. August F. Nielsen Co., supra, 455 N.Y.S.2d at 627 (semble). Although the opinions in most of these cases have not enunciated any fundamental basis for their rulings to this effect other than the federal policy itself, a deeper rationale for the rule espoused in these decisions can readily be found in an established common-law principle governing the general validity of choice-of-law clauses that has been adopted by the courts of all jurisdictions, including this Court.

It is well settled that a contractual choice-of-law provision will not generally be applied where its application would require resort to a rule of substantive law that would violate a fundamental public policy of the jurisdiction whose law would otherwise apply to the transaction. E.g., The Kensington, 183

U.S. 263, 268-70 (1902); Barnes Group, Inc. v. C & C Products, Inc., 716 F.2d 1023, 1028-30 (4th Cir. 1983); FDIC v. Bank of America, 701 F.2d 831, 834-35 (9th Cir. 1983), cert. den. 464 U.S. 935 (1983); Keystone Leasing Corp. v. People's Protective Life Ins. Co., 514 F.Supp. 841, 847-48 (E.D.N.Y. 1981); Hall v. Superior Court, 197 Cal.Rptr. 757, 761 (Cal.App. 1983); Temporarily Yours-Temporary Help Services, Inc. v. Manpower, Inc., 377 So.2d 825, 827 (Fla.App. 1979); Kronovet v. Lipchin, 415 A.2d 1096, 1106 (Md. 1980); State ex rel. Geil v. Corcoran, 623 S.W.2d 557, 559-60 (Mo.App. 1981); Restatement (2d), Conflict of Laws §187(2)(b) and comment g. See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., supra, 473 U.S. at 637n.19. In recent years, under the influence of the Restatement and certain commentators, this settled rule has been further refined by taking into account, as an additional factor bearing upon the enforceability of such a provision, the question whether its application would also have the effect of nullifying one of the obligations imposed by the parties' agree-

ment. Bense v. Interstate Battery System, Inc., 683 F.2d 718, 722 (2d Cir. 1982); Kronovet v. Lipchin, supra, 415 A.2d at 1105n.18; State ex rel. St. Joseph Light & Power Co. v. Donelson, supra, 631 S.W.2d at 891-92; Restatement, supra, §187, comment e; Weintraub, Commentary on the Conflict of Laws 373-74 (3d ed. 1986). See Commonwealth Edison Co. v. Gulf Oil Corp., supra, 541 F.2d at 1269.

This established principle was initially adopted by this Court as a rule of federal law in its decision in The Kensington, supra, 183 U.S. 263, where the Court relied upon the rule to decline enforcement of a choice-of-law provision specifying the application of Belgian law to a transatlantic baggage contract between two American citizens. Finding that it would effectively foreclose reliance on established rules of federal law governing the liability of common carriers, the Court held that enforcement of this choice-of-law provision should be refused on the ground that this would result in a "violation of the public policy of the United States." Id., 183 U.S. at 269.

The enduring viability of the rule adopted in The Kensington was most recently reaffirmed by the Court in its opinion in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., supra, 473 U.S. 614, where the Court stated, in considering the enforceability of a choice-of-law clause specifying Swiss law as the governing law, that "we would have little hesitation in condemning the agreement as against public policy" if its application should result in the preclusion of remedies for alleged antitrust violations committed in the United States. Id., 473 U.S. at 637n.19. See also Scherk v. Alberto-Culver Corp., supra, 417 U.S. at 519n.14 (suggesting the same result might follow on grounds of "public policy" if a forum-selection provision in the parties' agreement should result in the deprivation of remedies for violations of federal securities laws). Thus, in the decisions of this Court as in all other courts, this established doctrine has continued to provide an important limitation on the enforceability of choice-of-law clauses.

B. Application of This Settled Rule to the Court of Appeal's Interpretation of the Choice-of-Law Clause at Issue Here Would Require That the Clause, as So Intepreted, Be Held Invalid on the Ground That It Would Contravene the Fundamental Federal Policy Favoring the Arbitration of Private Disputes.

This Court has never had occasion to apply this settled doctrine to a choice-of-law clause selecting the law of a state of the United States, because, as noted above, in every instance in which it has confronted such a provision, it has either ignored it as irrelevant to the applicability of federal law or construed it as encompassing federal as well as state law. Fidelity Federal S. & L. Assn. v. de la Cuesta, supra, 458 U.S. at 157n.12; United States v. Kimbell Foods, Inc., supra, 440 U.S. 715; Scherk v. Alberto-Culver Co., supra, 417 U.S. 506; Bernhardt v. Polygraphic Co., supra, 350 U.S. 198. It is being assumed for purposes of the present discussion, however, that the Court might accept the view of the court below that the choice-of-law clause at issue here must be construed as excluding the application of federal law. In that event, the question would be squarely presented

whether this provision, as so interpreted, would be rendered unenforceable as a violation of federal public policy under the rule described above.

Volt submits that this question would have to be answered in the affirmative. There is plainly no reason why this settled rule would apply with any less force where the violation of federal public policy would arise from state law than where it would arise from the law of a foreign nation. Nor is there any doubt that the state law at issue here would indeed contravene a fundamental federal policy. This Court has repeatedly declared that the Federal Arbitration Act establishes a "liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., supra, 460 U.S. at 24. Accord Perry v. Thomas, supra, 107 S.Ct. at 2525; Shearson Amer. Express, Inc. v. McMahon, 107 S.Ct. 2332, 2337 (1987); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., supra, 473 U.S.at 625; Southland Corp. v.

Keating, supra, 465 U.S. at 10. Given the frequency and vigor with which the Court has underscored the importance of this policy in its recent decisions (id.), it must be accorded at least the same weight as the policies underlying the antitrust and carrier-liability laws that were deemed to justify the Court's pronouncements on the invalidity of choice-of-law clauses in the cases cited above. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., supra, 473 U.S. at 637n.19; The Kensington, supra, 183 U.S. at 269. See also Scherk v. Alberto-Culver Co., supra, 417 U.S. at 519n.14 (securities laws). There is likewise no serious question that the state law that would be applied pursuant to the choice-of-law provision in this case would directly contravene this federal policy, since it would prevent enforcement of an arbitration agreement otherwise subject to the Federal Act in circumstances in which federal law would clearly require that the agreement be enforced. The conclusion is thus unavoidable that if the choice-of-law clause at issue here should be

interpreted as precluding the application of federal law to the present dispute, it should thereupon be declared unenforceable on the ground that, as so interpreted, it would violate the fundamental public policy of the United States as declared by the Federal Arbitration Act.

As noted earlier, several lower courts have already reached precisely this result with respect to choice-of-law clauses designating state law that were claimed to preclude enforcement of arbitration agreements pursuant to the federal Act. Commonwealth Edison Co. v. Gulf Oil Corp., supra, 541 F.2d at 1269; Paul Allison, Inc. v. Minikin Storage, Inc., supra, 486 F.Supp. at 3; State ex rel. St. Joseph Light & Power Co. v. Donelson, supra, 631 S.W.2d at 891-92. See also Mesa Operating Ltd. P'ship. v. Intrastate Gas Comm., supra, 797 F.2d at 243-44 (citing Commonwealth Edison, supra); Huber, Hunt & Nichols, Inc. v. Architectural Stone Corp., supra, 625 F.2d at 25n.8 (semble); Cone Mills Corp. v. August F. Nielsen Co., supra, 455 N.Y.S.2d at 627 (semble). In

this discussion, it has been shown that these decisions were soundly based in settled legal principles and basic considerations of national policy. They should therefore be approved and followed by this Court. In the event the Court should be forced to reach this question by its acceptance of the court of appeal's interpretation of the choice-of-law clause at issue in this case, the Court should accordingly hold, consistently with the rule of these decisions, that the Federal Arbitration Act must govern the disposition of this controversy notwithstanding any contrary prescription of the governing law that might be derived from that clause.

CONCLUSION

The choice-of-law clause in the Volt-Stanford contract should be interpreted to encompass the application of the Federal Arbitration Act to this controversy. In any event, even if the clause were to be interpreted otherwise, federal law should be deemed to govern the disposition of this case as a matter of fundamental federal policy. For

either or both of these reasons, the judgment of the California Court of Appeal should be reversed, and the case should be remanded with a direction that Volt's petition to compel arbitration be granted.

Dated: May 25, 1988

Respectfully submitted,

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